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No. 90-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE THE FLORIDA CABLE TELEVISION ASSOCIATION, JONES INTERCABLE, INC., THE KENTUCKY CABLE TELEVISION ASSOCIATION, THE MICHIGAN CABLE TELEVISION ASSOCIATION, THE OHIO CABLE TELEVISION ASSOCIATION AND THE PENNSYLVANIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF PETITIONER WARNER CABLE COMMUNICATIONS INC.

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MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

Pursuant to Rule 37.2 of the Supreme Court Rules, Amici Curiae The Florida Cable Television Association ("FCTA"), Jones Intercable, Inc. ("Jones Intercable"), The Kentucky Cable Television Association ("KCTA"), The Michigan Cable Television Association ("MCTA"), The Ohio Cable Television Association ("OCTA") and The Pennsylvania Cable Television Association ("PCTA") hereby move this Court for leave to file a Brief Amici Curiae in support of petitioner Warner Cable Communications Inc. ("Warner Cable"). This motion is necessary because one of the parties, the City of Niceville, has refused to provide these *amici* with written consent to file a Brief Amici Curiae.

FCTA, KCTA, MCTA, OCTA and PCTA are all trade associations that represent owners and/or operators of cable television systems within their respective states, which combined serve approximately 10.6 million subscribers. Jones Intercable is a Colorado corporation that owns and operates approximately 60 cable television systems throughout the United States.

The issues raised by Warner Cable's petition are of great concern to FCTA, KCTA, MCTA, OCTA, PCTA and Jones Intercable, and these *amici* support Warner Cable's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Despite a formal request by counsel for these *amici* to obtain written consent from Warner Cable and the City of Niceville, and despite Warner Cable giving its written consent, the City of Niceville has formally refused to give written consent to these *amici* to file a Brief Amici Curiae.

WHEREFORE, FCTA, KCTA, MCTA, OCTA, PCTA and Jones Intercable respectfully request that this Court allow them to file a Brief Amici Curiae in support of Warner Cable's petition.

Respectfully submitted,

/s/ R. Bruce Beckner

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Sixth Report and Order on Television Allocations, 1 Rad. Reg. (P&F) 91:601 (1952) 7

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Other Sources

Broadcasting Yearbook 1990 9
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Multichannel News, April 1, 1991 8
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INTEREST OF AMICI

The Florida Cable Television Association ("FCTA") is a trade association representing 50 owners or operators of 190 cable systems in the State of Florida serving approx-

imately 3.2 million subscribers. The case before the Court concerns a privately-owned cable system in Florida that is threatened with destruction at the hands of a municipal government that proposes not only to compete with that system through predatory means but also to regulate it economically as well.

Jones Intercable, Inc. ("Jones Intercable") is a Colorado corporation that owns and operates approximately 60 cable television systems throughout the United States. It operates systems in large metropolitan areas as well as in small cities and towns and has two cable television systems presently threatened with a municipal overbuild.

The Kentucky Cable Television Association ("KTCA") is a trade association that represents 47 companies that own or operate 143 cable television systems in the State of Kentucky, serving approximately 661,655 subscribers. In addition, there are nine actual or threatened "overbuilds" of privately owned cable television systems in the State of Kentucky.[1]

The Michigan Cable Television Association ("MCTA") is a trade association that represents 32 companies that own or operate 276 cable television systems in the State of Michigan, serving approximately 1.6 million subscribers. Five privately-owned cable television systems in Michigan are actually overbuilt or have been threatened with a municipal overbuild.

The Ohio Cable Television Association ("OCTA") is a trade association that represents 49 cable television operators in the State of Ohio who own or operate 314 cable systems serving a total of approximately 2.5 million subscribers. Two privately-owned cable television systems in

[1] "Overbuild" is the generally accepted term in the cable television industry that refers to a situation where two cable systems exist side-by-side and compete with each other on a customer-by-customer basis.

Ohio are actually overbuilt or have been threatened with a municipal overbuild.

The Pennsylvania Cable Television Association ("PCTA") is a trade association that represents 77 companies that own or operate 171 cable television systems in the Commonwealth of Pennsylvania, serving approximately 2.6 million subscribers. One privately-owned cable television system in Pennsylvania is threatened with a municipal overbuild.

The petition of Warner Cable Communications Inc. ("Warner Cable") asks the Court to determine the constitutionality of a local government's operation of a cable television system in predatory (*i.e.* tax-subsidized, below-cost) competition with an existing privately-owned cable operator when the necessary outcome of that competition will be the silencing of the only locally-based First Amendment speaker. The ability of a municipal government to over-build, economically regulate and unfairly compete with a private company in the cable television industry is an issue of great concern to FCTA, Jones Intercable, KCTA, MCTA, OCTA and PCTA. These *amici* support Warner Cable's petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE PETITION

The question before the Court is whether a municipality can destroy the only locally-based media outlet (in this case the local cable television operator) through a combination of predatory competition and economic regulation without violating the First Amendment. The Eleventh Circuit held that a municipality could take such action with impunity; the destruction of the cable television company by these means was not "First Amendment injury," the Court of Appeals said. *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634, 637-38 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. March 15, 1991)

(No. 90-1463). This is error. The replacement of the *only* privately-owned mass medium speaker in a community by a government speaker cannot be a matter of indifference under the First Amendment.

The Court of Appeals turned a deaf ear to Warner Cable's claim that the City, by virtue of its status as a governmental unit, possessed so many competitive advantages that a competing municipally-owned cable system threatened Warner Cable's very existence in Niceville, not just the amount of Warner Cable's profits. *Id.* at 638. Although the District Court held that Warner Cable's argument was premature—the threatened destruction not having taken place—the Eleventh Circuit would not have allowed Warner Cable to offer its proof even after the company's demise in Niceville. There being no direct governmental restraint on Warner Cable's speech, the Eleventh Circuit refused to find that the First Amendment shielded Warner Cable from the consequences of the City's predatory competition and economic regulation. *Id.* at 640. In essence, the Eleventh Circuit held that Warner Cable had not stated a claim for relief under the First Amendment.[2] Warner Cable was not permitted a trial to show

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[2] The Eleventh Circuit opinion repeatedly seeks to minimize the nature of the injury to Warner Cable, characterizing it as the loss "of Warner's profitable position as the only speaker in a captive cable market." *Id.* at 638. It is totally inappropriate for an appellate court to make such factual conclusions in the absence of a full trial record. The Eleventh Circuit's holding is not based on a failure of proof by Warner; it is based on a failure to state a claim for which relief can be granted. *Id.* at 636. As such, the courts are required to assume the truth of the factual matters alleged. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) ("For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted . . . And, the complaint is to be liberally construed in favor of plaintiff." (citations omitted)); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief.").

the nature of the City's predatory competition, nor the inevitable effect of that competition on any privately-owned cable operator, including Warner Cable.

The Eleventh Circuit's holding flouts decisions of this Court and is based on demonstrably false premises. It flouts this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) in three ways: (1) by categorically refusing to afford First Amendment protection to a cable system threatened with exclusion from the community by government action, (2) by permitting the City to continue economic regulation of Warner Cable's system in Niceville even as the City predatorily competes with that system and (3) by denying Warner Cable an opportunity to prove its claim that it would be silenced as a result of this tax-subsidized, below cost competition. It also ignores the jurisprudence of this Court, actions by the Congress and decisions of the Federal Communications Commission, all of which are premised on preserving localism as a core First Amendment value. Finally, by characterizing the situation in Niceville as a matter of simple economic competition between competing speakers (the outcome of which should be a matter of indifference under the First Amendment), the Eleventh Circuit wrongly equates the constitutional status of a government speaker with that of a private speaker.

I.

LOCALISM IS A SIGNIFICANT FIRST AMENDMENT VALUE

The Eleventh Circuit decision in this case sanctions a Faustian bargain between the municipal government and the citizens it purports to serve: In exchange for the promise of a few dollars off their cable TV bill (which likely will be added to every resident's tax bill), the citizens of Niceville lose the only editorial voice likely to eriticize that

government's activities or those of its officials. The First Amendment does not countenance such a bargain.

The premise that the value of ideas should be determined by the market for them, not by government, is the foundation upon which the First Amendment was built. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Another basic premise of the First Amendment is that "a free press is indispensable to a free society." *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 145 (1973) (Stewart, J., concurring); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("The press was protected so that it could bare the secrets of government and inform the people.") In the context of regulating broadcast discussion of public issues, Congress has expressed an unmistakable desire to preserve private control of the media. *Columbia Broadcasting*, 412 U.S. 94. Further, according to this Court, Congress' desire "is not one having peculiar applicability to television broadcasting. Its force is not diminished by the variant technology involved in cable transmissions." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

The crucial role the electronic media perform as disseminators of local news and comment to the immediate communities they serve has long been recognized by the Federal Communications Commission (hereinafter, the "Commission" or "FCC") and by the courts. In the 1941 chain broadcasting rulings, the Commission first delineated local ownership rules that would ensure the responsiveness of broadcasters to the needs of the communities in which they operated. *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060 (May 1941). These early rules prohibited the common ownership of two or more AM radio stations and were premised on promoting diversity of program and service viewpoints to local listeners. *Id.* In support of these rules, the Commission stated that "local program service is a vital part of community life" and that licensees should "serve the needs of the

local community by broadcasting . . . outstanding local events . . . and other programs of local consumer and social interest." *Id.* As this Court noted in upholding these regulations, the Commission's recognition of localism as a significant value was fully consistent with the mandate given the Commission by Congress. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217-18 (1943).

The promotion of "localism" is not only the underlying rationale of the Commission's local ownership rules, but also has been a fundamental goal governing the further development of the electronic media. *See, e.g., Sixth Report and Order on Television Allocations*, 1 Rad. Reg. (P&F) 91:601 (1952) (establishment of Table of Assignments would preserve frequencies for local stations to provide service to their communities); *Multiple Ownership Rules*, 22 F.C.C.2d 306 (1970) (the rules are designed to prevent any possible undue influence on local public opinion by relatively few persons or groups); *Low Power Television Service*, 51 Rad. Reg.2d (P&F) 476 (1982) (low power television is particularly well suited to the provision of diverse local program service); *First Report and Order in Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd. 1723,1724 (1989) (local ownership rules encourage ownership diversity "as a means of promoting diversity of program sources and viewpoints," not as an end in themselves).

Cable television is recognized as an important source of local news and information. *See CATV Program Origination*, 20 F.C.C.2d 201 (1969) (acknowledging cable television's great potential to increase the number of outlets for local self-expression and augment the public's choice of programs and services); *see also Teleprompter Corp. v. Columbia Broadcasting Sys., Inc.*, 415 U.S. 394, 403-04 & n.8 (1974).

Although the FCC's efforts at mandating local programming by cable systems were sometimes found to exceed the agency's authority under the Communications Act and

the First Amendment, *see, e.g., Report and Order in Program Origination and Cablecasting*, 49 F.C.C.2d 1090 (1974) (formally rescinding the mandatory local origination rule); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) (holding that mandatory local access rules exceeded the jurisdiction of the Commission), cable television nevertheless has been cited as among the chief contributors to the dramatic increase in local media outlets. *Second Report and Order in Broadcast Multiple Ownership Rules*, 4 F.C.C. Rcd. 1741 (1989).

Cable television's local news and information services consist of far more than merely the "access programming" produced by the public and presented by the cable system. Consistent with Warner Cable's practice in Niceville, privately-owned cable systems produce and distribute original programs of importance to the specific communities they serve, including news programs featuring city council meetings, discussions and debates of local governmental affairs and coverage of local public events as well as a variety of sports and entertainment programs. *See* Petition of Warner Cable at 3-4, *Warner Cable Communications Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3674 (U.S. March 15, 1991) (No. 90-1463) (hereinafter "Petition"); "L.O. Programming Pulls in Advertisers," *Multichannel News*, April 1, 1991, at 24; "Guam Cable Scoops Up Big News Award," *Multichannel News*, March 25, 1991, at 22; "Windy City Warmed by Cable News Wars," *Multichannel News*, March 25, 1991, at 31; "Cable Does Local News," *Cable TV Business*, Sept. 15, 1990, at 27. That cable television makes an important contribution to the *local* marketplace of ideas is, therefore, undoubted.

While a government-owned cable system may decide to import signals from competing regional, state or national editorial voices (*e.g.* distant broadcast television stations, Cable News Network, etc.), it will face no competition in the local marketplace of ideas once Warner Cable's system

succumbs.[3] Warner Cable's system in Niceville, the *only* local media outlet, is a representative example of numerous situations around the country in which privately-owned systems have either been threatened with or are actually being overbuilt by a municipally-owned cable system. For instance, there are now six communities in which a privately-owned cable system has been overbuilt by a municipal cable system and 85 communities in which a municipal overbuild of a privately-owned cable system is pending. Kagan, *Cable TV Municipal Ownership*, March 8, 1991. Typically, these are small communities, not major metropolitan areas. As in Niceville, most of these communities have no local broadcast television (86 percent), or have no daily newspaper (71 percent). *Id.*; Broadcasting Yearbook 1990; Television and Cable Factbook 1990; Editor and Publisher Yearbook 1989.

The danger posed to the residents of Niceville, and to residents of more than two-thirds of the cities or towns facing a pending or existing municipal overbuild, is that the municipal government's action in silencing the privately-owned cable system deprives local residents of the *only* independent local *video* news and editorial voice.

II.

GOVERNMENT INFLICTION OF ECONOMIC INJURY ON A SPEAKER IS FIRST AMENDMENT INJURY

Although the City of Niceville has not threatened to send the constable to switch off Warner Cable's system in the City, the threat of predatory economic competition and regulation is just as real; and Warner Cable alleges it will have the same effect—excluding Warner cable from the marketplace in Niceville.[4] Warner Cable claims injury

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[3] The availability of regional, state or national speakers on the municipal cable system does not alleviate this problem. Such speakers will, at best, participate only sporadically in discussions of local issues.

[4] A variety of forms of predatory competition have been characterized

because the City will compete with it on substantially unequal terms by using subsidized low-rate financing, guaranteed by tax revenues; by shifting some of the costs of cable television to the City's monopoly public utility operations or to general tax revenue, resulting in below-cost pricing of cable television service to City cable system customers; and by not needing to include franchise fees and taxes as part of its price to customers.[5] Given these economic advantages and the ability to increase Warner Cable's costs through economic regulation (*see* pp. 15-19, *infra*), it is not surprising that a privately-owned potential overbuilder withdrew its franchise application in Niceville after the City expressed interest in building a municipally-owned system. Petition at 5. This exclusionary phenomenon does not result because of any peculiar characteristics of the business of cable television, but because the municipal government in these circumstances has such overwhelming advantages as a competitor that no private company can expect to survive in competition with it.[6]

Warner Cable (or any other privately-owned company) faces an avalanche of competitive handicaps in competing with a municipal government. Warner Cable is required to pay Niceville a franchise fee of five percent of its gross

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as "exclusionary" under Section 2 of the Sherman Act. 15 U.S.C. § 2 (1984). *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985); *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 851 (1986).

[5] Moreover, all of the residents of Niceville would have a unique financial incentive to subscribe to the municipal system—a default on the debt used to pay for the system would jeopardize the City's entire fiscal structure and would be a drain on the tax revenue.

[6] In fact, the Florida legislature has expressed its view that overbuilders should compete with existing cable operators on a "level playing field." Florida law provides "No municipality or county shall grant any overlapping franchises for cable service within its jurisdiction on terms or conditions more favorable or less burdensome that those in any existing franchise within such municipality or county." Fla. Stat. § 166.046(3)(1989).

revenues while Niceville, as the franchisor, will *not* be responsible for paying any similar fee to itself. Moreover, the City collects property taxes from Warner Cable. Even though it would be providing substantially identical services, Niceville would be exempt from paying any taxes or fees. Moreover, the City has stated that it would use revenues from those taxes to support cable television operations, rather than raise prices and risk losing customers to Warner Cable, its privately-owned competitor. These financial advantages, together with access to capital at tax-exempt rates and the ability to shift cable-related costs to other municipal services make a municipality a formidable competitor in the cable television business.

Indeed, the Eighth Circuit has recognized that the competitive advantages of a municipality in the cable television business are so great that elimination of the privately-owned cable company is a foreseeable consequence of municipal entry. The Eighth Circuit held that "the *displacement of competition* necessarily results" when municipalities enter the cable television business. *Paragould Cablevision, Inc. v. City of Paragould*, No. 90-1820, slip op. at 6 (8th Cir. April 15, 1991) (emphasis added).

Moreover, municipalities wield substantial regulatory power over cable systems as well. The Cable Communications Policy Act of 1984 (the "Act") gives municipalities substantial economic regulatory power over their privately-owned competitors. 47 U.S.C. § 521, *et seq.* (1984). The regulatory powers municipalities enjoy under the Act, therefore, allow them to force privately-owned cable operators into massive rebuilds and reconfigurations of their systems in hopes of securing franchise renewals. For example, under the Act, municipalities have the authority to determine, as a condition of renewal, the number of Public, Educational, and Governmental ("PEG") access channels a cable operator must set aside. *Id.* at § 531. This authority enables a municipality to limit indirectly the number of channels its privately-owned competitor has available for

commercial programming. The Act gives franchising authorities the power to control their privately-owned competitors' prices and to obtain advance knowledge of their competitors' moves in the marketplace. *Id.* at § 543. Further, under the Act, municipalities have the power to specify the overall channel capacity privately-owned cable operators must provide and to establish requirements for operators' studio and production facilities together with their equipment, such as vans and cameras, for PEG use. *Id.* at § 544. Thus, at renewal time, a municipality has the power to force substantial increases in a privately-owned cable operator's costs, putting it at a further disadvantage in competing with a government-owned system. Ultimately, if a municipality denies renewal of a privately-owned cable operator's franchise, the Act allows the municipality to force a sale of the cable system either to the municipality or another buyer. *Id.* at § 547.

Moreover, the franchise granted Warner Cable by the City of Niceville gives the City certain specific regulatory authority that could be used to competitive advantage: (1) control over the ability to install additional poles, (2) authority to regulate rates for installation of equipment and for basic services, (3) 45 days advance notice of any rate changes, and (4) authority to require Warner Cable to extend service to unserviced areas in response to subscriber requests regardless of the economic merit of making such an extension.

Where, as in Niceville, government threatens to control the media not simply by regulating it, but by direct commercial participation in the market, the risk to the public is more than a mere increase of government control over the discussion of public issues; it is a risk of the government's voice altogether supplanting that of the private media. *See Columbia Broadcasting*, 412 U.S. at 126. For cities and towns such as Niceville to enjoy any of the benefits of an independent local editorial voice, and for cable television to remain a credible participant in the local

marketplace of ideas, it is essential that privately-owned cable operators not be driven from that marketplace by predatory competition from municipal governments.

This Court has established that governmental exclusion of a cable operator from the marketplace "implicate[s] First Amendment interests" because "through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, [cable operators] seek[ ] to communicate messages on a wide variety of topics and in a wide variety of formats." *Preferred*, 476 U.S. 488, 494 (1986). The Eleventh Circuit held, however, that predatory competition and economic regulation were acceptable under the First Amendment: "Warner fails to assert a protected first amendment interest even if [commencing operation of] the . . . City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *City of Niceville*, 911 F.2d at 636.

Such a conclusion leaves First Amendment speakers open to economic attack by municipal governments and is legal error. This Court consistently has held that government can inflict "First Amendment injury" by imposing economic loss. The choice of means used by government to silence a speaker does not govern the presence or absence of First Amendment protection. *See, e.g., Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Speiser v. Randall*, 357 U.S. 513 (1958); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

For example, in *Riley*, the economic effect of litigation risks led this Court to invalidate a state statute regulating solicitation of charitable contributions. This Court recognized that the statute "will subject [fundraisers] to poten-

tial litigation over the 'reasonableness' of the fee . . . [T]he fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair." *Riley*, 487 U.S. at 794.

Similarly, in *New York Times v. Sullivan*, the risk of economic injury lead this Court to strike down an Alabama law compelling critics of official conduct to guarantee the truth of their factual statements. *Sullivan*, 376 U.S. at 279. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or *fear of the expense of having to do so.*" *Id.* (emphasis added).

Discriminatory taxation of the media is another purely economic act that this Court has held violates the First Amendment when the discrimination applies to speakers in the same medium. In *Arkansas Writers'*, *Minneapolis Star*, and *Grosjean*, this Court invalidated three different forms of taxation, each of which unconstitutionally discriminated among members of the press (either newspapers or magazines).[7] In none of these cases did the government seek to halt or even to interfere with the publication of any information; rather, the "First Amendment injury" resulted solely from application of a tax. The newspapers and magazines subject to discriminatory taxation were not precluded from speaking; instead, they suffered economic injury as a result of being targeted for increased tax liabilities, an act this Court, found to be repugnant to First Amendment principles. *See, e.g., Ar-*

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[7] Although this Court recently held that "differential taxation of speakers . . . does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas[,]" this Court did not reject the holdings of its earlier decisions that government, by imposition of economic loss through taxation, can inflict First Amendment injury. *Leathers v. Medlock*, 59 U.S.L.W. 4281, slip op. at 12-13 (U.S. April 16, 1991) (Nos. 90-29, 90-38).

kansas Writers', 481 U.S. at 229-30; *Minneapolis Star*, 460 U.S. at 585; *Grosjean*, 297 U.S. at 250.[8]

The economic injury Warner Cable will sustain as a result of the predatory competition and sovereign advantages enjoyed by Niceville in its operation of a municipally-owned cable television system is no less harmful than the cost a newspaper might bear as a result of defending libel suits under the Alabama rule, the litigation risk and costs the charity solicitors in *Riley* would suffer in defending the "reasonableness" of their fee, or the diminished profitability the publications in the tax cases would suffer by paying a special tax. In each case, targeted government action results in economic injury to a First Amendment speaker. Moreover, unlike here, in those cases the government-imposed economic burdens did not threaten the speaker's very existence.

III.

A CITY MAY NOT ECONOMICALLY REGULATE AND COMPETE WITH A PRIVATELY-OWNED CABLE SYSTEM

In this case, the Eleventh Circuit evaded the inescapable conclusion under *United States v. O'Brien*, 391 U.S. 367 (1968) and under *Preferred* that the City's plan to continue economic regulation of Warner Cable while competing with it violates the First Amendment. The Court of Appeals did so by asserting that the ordinance providing for a municipal cable system had "no effect" on Warner Cable's speech. *City of Niceville*, 911 F.2d 634, 637. Aside from improperly having made a factual assumption to rebut

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[8] In addressing another form of economic injury, this Court held that "[i]f the Government may not impose a tax upon the expression of ideas in order to discourage them it may *not* achieve the same end by reducing the individual who expresses his views to second-class citizenship by *withholding tax benefits* granted others." *Speiser*, 357 U.S. at 536 (emphasis added).

Warner Cable's claims[9] (namely that the municipal cable ordinance and the City's resulting construction and operation of a tax-subsidized cable system would not affect Warner Cable's speech by undermining it economically), the Eleventh Circuit's rationale overlooks a fundamental point of the argument: The presence of the City as an economic competitor to Warner Cable changes the context in which its regulatory authority must be judged. If a showing of a "substantial government interest" is required to sustain more government regulation of a privately-owned cable system, then a higher showing should be required to sustain a combination of government regulation *and* predatory competition with a privately-owned cable system.

Since this Court's decision in *Preferred*, governmental regulation of cable television systems is scrutinized under the "substantial government interest" standard enunciated in *O'Brien*.[10] *Preferred*, 476 U.S. at 494. This Court left to the lower courts the task of defining the circumstances under which the First Amendment allows governmental regulation of cable television. *Id.* at 495-96.

Even before this Court's decision in *Preferred*, courts found that a government's ability to regulate a cable system operator consistent with the First Amendment was quite limited. In some cases, courts focused on the per-

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[9] Given the nature of the Eleventh Circuit's decision—that Warner Cable did not state a claim for relief under the First Amendment—the court should have assumed the truth of all of Warner Cable's factual allegations. *Jenkins*, 395 U.S. at 421; *Conley*, 355 U.S. at 45-46. Warner Cable claimed the City of Niceville would run it out of business; the Eleventh Circuit wrongly denied Warner Cable the opportunity to prove that claim at trial.

[10] Under the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the government interest is unrelated to the suppression of free speech; and (4) the incidental restriction on First Amendment freedom is no greater than essential to further that interest. *O'Brien*, 391 U.S. at 377.

ceived uniqueness of cable television and the supposed lack of "competition" resulting from the presence of only one cable operator in a market. *See, e.g., Central Telecommunications v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987); *Pacific West Cable Co. v. City of Sacramento*, 672 F. Supp. 1322 (E.D. Cal. 1987); *Century Fed., Inc. v. City of Palo Alto*, 648 F. Supp.1465 (N.D. Cal. 1986) ("*Century Fed. II*"); *Century Fed., Inc. v. City of Palo Alto*, 579 F. Supp. 1553 (N.D. Cal. 1984) ("*Century Fed. I*").[11]

After this Court's decision in *Preferred*, the Ninth Circuit and federal District Courts in California held that the "propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien*, 391 U.S. 367." *Century Fed. II*, 648 F. Supp. at 1475; *see also Group W Cable*, 669 F. Supp. 954; *Pacific West Cable*, 672 F. Supp. 1322.[12]

The district court in *Century Fed. II*, for instance, rejected the "unique characteristics" rationale enunciated by the Seventh, Eighth and Tenth Circuits:

> Although the fact that cable television places a heavier burden on the public domain than more traditional

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[11] Although most of the cases discussed in this section deal primarily with regulation of access to the market, the analysis is equally applicable to all forms of economic regulation.

[12] The Seventh Circuit, in a case decided after *Preferred*, adopted the district court's use of the *O'Brien* test as the appropriate framework for analyzing whether the governmental regulation violated plaintiff's First Amendment rights, but suggested that stricter First Amendment scrutiny was not precluded by the particular characteristics of cable television. *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548-49 (7th Cir. 1989).

> forms of the media may justify some government regulation of *that* burden, the defendant cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

Century Fed. II, 648 F. Supp. at 1475 (emphasis added); *see also Group W Cable*, 669 F. Supp at 966-67 (city had a legitimate interest in the public safety of its citizens, which provided justification for *some* but not all government regulations).[13]

However, even under the test most favorable to government regulatory efforts, the existence of two cable systems competing in a particular market, especially when one of them is backed by the power of the municipal government, removes the justification for economic regulation. Therefore, allowing a city to be both economic regulator of and competitor with a cable television company is contrary to the First Amendment.[14] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985) (holding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's ex-

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[13] The court held that the public access requirements, the technical requirements, and the financial capability information requested by the city in its Request for Proposals to Provide Cable Television Services were also unconstitutional regulations. *Group W Cable*, 669 F. Supp. at 968-71; *see also Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1553 (N.D. Cal. 1987) ("*Century Fed. III*") ("defendant's access channel, universal service and state-of-the-art requirements violate the first amendment. . .").

[14] We do not argue that the City is barred from health and safety regulation to protect its citizens and the public domain; however, such regulation differs from economic regulation that has major First Amendment consequences.

clusive franchising regulation would violate the First Amendment).

Thus, even where a municipal government is *not* competing with a cable television company by means of tax-financed subsidies and other methods not available to a private party, it must show a substantial state interest to justify such regulation. Under such a test, a city has no more justification for economically regulating one of two competing cable companies than it has to regulate the home delivery time of the local newspaper, the amount of music played on the local radio station or the amount of time a local television station devotes to religious programming.

Where, as here, the government seeks to employ *all* the unique weapons at its disposal, including regulatory power, to silence a speaker through predatory economic competition, a compelling governmental interest should be shown. The City should have been required to show what compelling interest gives it the right to threaten Warner Cable's economic destruction through both predatory competition and economic regulation. The Eleventh Circuit's decision in this case leaves a gaping hole in the protection mandated by *Preferred*—the Court of Appeals would permit a government that does not care for a particular speaker to silence it by subjecting it to predatory economic competition from the government in a manner not tolerated from a private party as well as by subjecting it to substantial economic regulation.[15] This result cannot be allowed to stand.

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[15] As the *Paragould* decision held, the municipal government's actions—otherwise violative of Section 2 of the Sherman Act, 15 U.S.C. § 2—would be immune as "state action" under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). *Paragould*, No. 90-1820, slip. op. at 6-7. Even if not immune under *Parker*, neither the local government nor its officials could be subject to an antitrust damage action as a result of the bar created by the Local Government Antitrust Act of 1984, 15 U.S.C. § 35 (1984).

CONCLUSION

The petition of Warner Cable Communications Inc. for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

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